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Mohd Azlan bin Mat Nor & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS D-05–2–01 OF 2012 AND D-05–3–01 OF 2012
AZAHAR MOHAMED, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
22 APRIL 2014

Criminal Procedure — Appeal — Appeal against conviction — Appellants charged with offence of trafficking in dangerous drugs — Whether trial judge erred in convicting appellants of trafficking — Whether element of common intention had been proven by prosecution — Whether conviction rested solely on uncorroborated evidence of agent provocateurs — Whether trial judge failed to appreciate defence case — Whether conviction unsafe — Whether appellate interference warranted

Evidence — Witness — Agent provocateur — Whether evidence of agent provocateurs had been rebutted by appellants — Whether 'Alcontara Notice' given to prosecution at earliest opportunity

Acting on information received two police officers (PW4 and PW6) had acted as agent provocateurs to lure the appellants to sell drugs to them. At the first meeting PW4 had negotiated with the second appellant for the purchase of the drugs. Upon the completion of the negotiation PW4 and PW6 had met again with the second appellant for the delivery of the drugs. After being satisfied that the agent provocateurs had the money to purchase the drugs, the second appellant had contacted the first appellant to bring the drugs. When the drugs were handed over to PW4 he gave the signal for the arrest of both the appellants. The bag was found to contain a substance that was later analysed by a government chemist to be 23.11g of methamphetamine, a dangerous drug. The appellants were arrested and charged with trafficking in drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The trial judge found the appellants guilty of the offence and accordingly convicted and sentenced them to death pursuant to s 39B(2) of the DDA. Hence the present appeal. The first appellant's appeal rested primarily on the fact that the trial judge had failed to discuss common intention and had made no mention of s 34 of the Penal Code ('Code'). The first appellant submitted that there was no evidence of his presence in the negotiations between the second appellant and PW4 and as such, the element of common intention to commit the offence of trafficking was not present. He thus contended that, if at all, he ought to be only found guilty of the offence of possession. The second appellant's grounds of appeal were that his conviction rested solely on the oral, uncorroborated

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evidence of the agent provocateurs, and that the trial judge had failed to appreciate the defence case. In short, both appellants contended that the trial judge had erred in his decision and that the error warranted appellate intervention.

Held, dismissing the appeal:

(1) On the factual matrix of the case there was a clear nexus between the second appellant and the first appellant and the seizure of drugs to attract common intention. For common intention to succeed the law did not require all culpable parties to be there at the same time. Further, s 40A of the Act, which deals with agent provocateur, assists the prosecution to establish a prima facie case. The net result of s 34 of the Code and s 40A of the DDA would require the first appellant to rebut the charge of trafficking. However, based on the evidence the first appellant had not discharged the legal burden placed on him (see paras 7–9).

(2) Similarly, the second appellant's submission regarding the evidence of the agent provocateurs had no merit because s 40A of the DDA obliged the court to accept the evidence of the agent provocateurs. However, such evidence could be rebutted by the second appellant's defence. In the present case, the second appellant had not put to the prosecution witness his defence that he was not involved in negotiations with PW4 for the sale of dangerous drugs. In addition, there was no evidence of the 'Alcontara Notice' being given to the prosecution at the earliest opportunity to sustain some probative value to the defence case and also some opportunity for the prosecution to rebut the defence case (see paras 11–12).

(3) It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justified a conviction as well as sentence. In the present case, there was sufficient material to support the charge and no reason to interfere with the findings of the trial judge (see paras 14–15).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, dua pegawai polis (PW4 dan PW6) telah bertindak sebagai ejen perangkap untuk mengumpan perayu-perayu untuk menjual dadah kepada mereka. Pada pertemuan pertama PW4 telah berunding dengan perayu kedua untuk pembelian dadah tersebut. Setelah selesai perundingan, PW4 dan PW6 berjumpa lagi dengan perayu kedua untuk penghantaran dadah tersebut. Berpuas hati dengan ejen perangkap mempunyai wang untuk membeli dadah tersebut, perayu kedua telah berhubung dengan perayu pertama untuk mmebawa dadah tersebut. Apabila dadah diserahkan kepada PW4 dia memberi isyarat untuk menangkap kedua-dua perayu. Beg tersebut didapati mengandungi bahan yang

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kemudiannya dianalisa oleh ahli kimia kerajaan adalah 23.11g methamphetamine, dadah berbahaya. Perayu-perayu ditangkap dan dituduh mengedar dadah, kesalahan di bawah s 39B (1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Hakim perbicaraan mendapati perayu-perayu bersalah atas kesalahan tersebut dan oleh itu mensabit dan menghukum mereka dengan hukuman mati berikutan s 39B(2) ADB. Maka rayuan ini. Rayuan perayu pertama bergantung terutamanya atas fakta bahawa hakim perbicaraan gagal untuk membincangkan niat bersama dan tidak membuat pernyataan tentang s 34 Kanun Keseksaan ('Kanun'). Perayu pertama berhujah bahawa tidak terdapat keterangan tentang kehadirannya di dalam perundingan di antara perayu kedua dan PW4 dan oleh itu, unsur niat bersama untuk melakukan kesalahan mengedar tidak wujud. Oleh itu dia menegaskan bahawa, dia hanya patut didapati bersalah dengan kesalahan milikan. Alasan rayuan perayu kedua adalah bahawa sabitannya semata-mata bergantung ke atas keterangan lisan dan tidak disokong ejen perangkap, dan bahawa hakim perbicaraan gagal untuk menilai kes pembelaan. Pendek kata, kedua-dua perayu berhujah bahawa hakim perbicaraan telah tersilap dalam keputusannya dan bahawa kesilapan tersebut mewajarkan campur tangan mahkamah rayuan.

Diputuskan, menolak rayuan:

(1) Atas matriks fakta kes terdapat Kaitan jelas di antara perayu kedua dan perayu dan rampasan dadah tersebut untuk membangkitkan niat bersama. Untuk niat bersama berjaya disisi undang-undang tidak memerlukan kesemua pihak bersalah berada pada masa yang sama. Selanjutnya s 40A Akta, yang berurusan dengan ejen perangkap, membantu pihak pendakwaan untuk membuktikan kes prima facie. Keputusan bersih s 34 Kanun dan s 40A ADB memerlukan perayu pertama untuk mematahkan tuduhan pengedaran dadah. Walau bagaimanapun berdasarkan ke atas keterangan, perayu pertama tidak melepaskan beban undang-undang yang diletakkan ke atasnya (lihat perenggan 7–9).

(2) Begitu juga, hujahan perayu kedua berkaitan keterangan ejen perangkap tidak mempunyai merit kerana s 40A ADB menyebabkan mahkamah menerima keterangan terhadap ejen perangkap. Walau bagaimanapun, keterangan sedemikian boleh dipatahkan oleh pembealaan perayu kedua. Dalam kes ini, perayu kedua tidak mengemukakan kepada saksi pendakwaan pembelaannya yang dia tidak terlibat dalam perundingan dengan PW4 untuk jualan dadah berbahaya. Dalam tambahan, tidak terdapat keterangan 'Alcontara Notice' diberikan kepada pihak pendakwaan pada peluang awal untuk mengekalkan nilai probatif kepada kes pembelaan dan juga peluang untuk pihak pendakwaan untuk mematahkan kes pembelaan (lihat perenggan 11–12).

(3) Adalah tetap bahawa ia terletak di tangan pembicara fakta untuk menilai

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kualiti keterangan dan untuk menentukan sama ada keterangan atas rekod menjustifikasikan sabitan dan juga hukuman. Dalam kes ini, terdapat keterangan material yang mencukupi untuk menyokong tuduhan dan tiada alasan untuk campur tangan dengan dapatan hakim perbicaraan (lihat perenggan 14–15).]

Notes

For a case on agent provocateur, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3085.

For cases on appeal against conviction, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 220–287.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Aung Thun & Anor v PP and another appeal [2014] 1 MLJ 784, CA (refd)

Baharum bin Jusoh & Ors v PP (Court of Appeal Criminal Appeal No C-05–112–115 of 2010) (refd)

Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)

Mahbub Shah v King Emperor AIR 1945 PC 118, PCC (refd)

PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)

Rex v Vincent Bonka & Anor [1936] 1 MLJ 53 (refd)

Roy Sahara v PP [2013] AMEJ 0131 (refd)

Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 39B(1)(a), 39B(2), 40A

Penal Code s 34

Appeal from: Criminal Trial No 45A-8 of 2010 (High Court, Kota Bharu)

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the first appellant.

Salim Bashir (shah Rizal with him)(Shah Rizal & Assoc) for the second appellant.

Diar Isda Yazmin Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the first and second respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] The first and second appellants' appeal against the decision of the High Court, convicting and sentencing the appellants for trafficking drugs came up for hearing on 26 September 2013 and on the same day we dismissed the appeal. My learned brothers Azahar Mohamed JCA and Mohtarudin Baki JCA have read the draft judgment and approved the same. This is our judgment.

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[2] The first and second appellants were charged as follows:

> Bahawa kamu bersama-sama pada 3.2.2010 jam lebih kurang 2.00 petang bertempat di hadapan pintu gerbang Masjid Beijing Rantau Panjang, di dalam Daerah Pasir Mas, di dalam Negeri Kelantan mengedar dadah berbahaya iaitu 23.11 gram Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

[3] The first appellant's petition of appeal can be summarised as follows:

(a) the learned trial judge erred in facts and in law when His Lordship convicted the appellant of trafficking charge and sentenced him to death. The learned trial judge erred when His Lordship failed to realise that the conviction was totally unsafe;

(b) the learned trial judge erred in facts and in law when His Lordship failed to realise that the informer, being reason of his active role in the transaction, must be called as a witness;

(c) the learned trial judge erred in facts and in law when His Lordship failed to realise that there was a break in chain of exhibits;

(d) the learned trial judge erred in law and in facts when he found that the element of common intention had been proven by the prosecution;

(e) the learned trial judge erred in law and in facts when he failed to rule at the end of case for the defence whether the evidence of the agent provocateur had been rebutted; and

(f) the learned trial judge erred in facts and in law when His Lordship failed to appreciate the defence case.

PRELIMINARIES

[4] The learned trial judge in his 29 pages judgment had set out the facts and reasons for conviction and sentence in detail. We do not think much judicial time should be spent to re-agitate the facts in any detail, save to say that PW4 and PW6 were police officers who negotiated with the second appellant in respect of the drugs and subsequently drugs were brought by the first appellant and the appellants were arrested.

BRIEF FACTS

[5] PW4 and PW6 played the role of agent provocateurs. The second appellant was introduced to PW4 and PW6 by an informer. PW4 had negotiated with the second appellant for purchase of drugs. Upon the

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completion of the negotiation on a subsequent date, PW4 and PW6 met the appellant for the delivery of the drugs. The second appellant after being satisfied PW4 had the money to purchase the drugs contacted the first appellant to bring the drugs. PW4 after being satisfied that it was drugs gave the signal for the arrest and both the appellants were arrested and the drugs seized.

SUBMISSION OF THE FIRST APPELLANT

[6] The learned counsel for the first appellant's submission can be summarised as follows:

(a) the learned trial judge failed to discuss common intention and made no mention of s 34 of the Penal Code. There was no evidence to show that the first appellant negotiated with SP4. There is no evidence that the first appellant intended to sell the drugs. The learned judge also failed to appreciate that the evidence of SP4 which stated that the second appellant said over the phone 'aku dah tengok duit dah cukup buat marilah benda itu' was challenged by the counsel; and relies on the case of *Mahbub Shah v King Emperor* AIR 1945 PC 118; *Rex v Vincent Bonka & Anor* [1936] 1 MLJ 53; *Baharum bin Jusoh & Ors v Public Prosecutor* (Court of Appeal Criminal Appeal No C-05–112–115 of 2010); and

(b) at the highest the first appellant ought only be found guilty of the offence of possession.

[7] The evidence of PW4 is clear that it was through the second appellant, the first appellant was contacted and the telephone conversation was heard by PW4. And subsequent to the telephone conversation, the first appellant delivered the drugs. On the factual matrix of the case there is clear nexus between the second appellant and the first appellant and the seizure of drugs to attract common intention. For common intention to succeed the law does not require all culpable parties to be there at the same time. The jurisprudence was articulated in the case of *Aung Thun & Anor v Public Prosecutor and another appeal* [2014] 1 MLJ 784, through Hamid Sultan bin Abu Backer JCA as following:

> [11] It is now well established that to invoke s 34 it is not a sine qua non for the prosecution to prove pre-concert or pre-planning in the true sense, (see *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528). It will be sufficient if the prosecution can establish that the appellants were in the place and took part in the crime and/or had nexus to the crime. Section 34 is not a substantive law but it is procedural in nature favouring the prosecution such as that of presumption. The effect of the application of s 34 is that once it is invoked in the charge itself and evidence is led to show that the appellants were involved in the crime, the appellants will be required to speak of their innocence or non involvement in the crime or that

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at the material time of the crime they have disassociated from the crime. Nothing more, (see *Ravindran a/l Ramasamy v Public Prosecutor* [2013] 4 MLJ 665; [2013] 4 AMR 502; *Phrueksa Taemchim (Thailand) v Public Prosecutor* [2013] 6 MLJ 808; [2013] 5 AMR 338).

[8] In addition, s 40A of the DDA 1952 which deals with agent provocateur assists the prosecution to establish a prima facie case. The jurisprudence relating to s 40A was articulated in the case of *Roy Sahara v Public Prosecutor* [2013] AMEJ 0131 by Hamid Sultan JCA as follows:

> What is important to note under section 40A(1) is that the agent provocateur's credibility can be discredited by other than the grounds stated in the section. Whether his evidence is discredited or not, all statements made by the accused to the agent provocateur are admissible in evidence. In essence, it allows incriminating statements, confession statements inclusive of hearsay statements of the accused to be indirectly admitted as evidence through the agent provocateur. That however does not mean that the accused can be convicted purely based on the agent provocateur evidence as what normally happens if a confession statement has been admitted according to law and the said confession statement per se can drive home the charge. Section 40A(1) statement by the agent provocateur does not have the strength and force of a confession statement though it may have corroborative force, taking into account the totality of the evidence and credibility of the prosecution case to sustain the charge notwithstanding the fact in law the 'agent provocateur' evidence on the particular issue stated in section 40A(1) need not be corroborated. In this respect, we are unable to accept the submission of learned Deputy Public Prosecutor that the Court is obliged to believe SP3's evidence as gospel truth.

[9] The nett result of s 34 of the Penal Code and s 40A of the DDA 1952 will require the first appellant to rebut the charge of trafficking. From the evidence we were not able to find sufficient material to say that the first appellant had discharged the legal burden.

THE SECOND APPELLANT'S SUBMISSION

[10] The learned counsel for the second appellant's submission can be summarised as follows:

(a) save for oral evidence of SP4 and SP6 there was no other corroborative evidence to show the negotiation of sale of drugs with the second appellant;

(b) agent provocateur evidence need to be read with caution though need not be corroborated;

(c) failure to appreciate the defence case in particular the defence case. The learned counsel for the second appellant's submission on this issue reads as follows:

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> We submit that this court need to magnify the defence version about the existence of one 'Hanif' who instructed second appellant to come by and fetch him at the front gate of a mosque.
>
> Upon arriving at the scene, second appellant discovered Hanifs friend whom he met a day before, were waiting together with 'Hanif' and saw a Proton Wira Aeroback parked by the road-side.
>
> 'Hanif' invited second appellant to get into the car. In the car, second appellant observed that 'Hanif' were making some phone calls and informed second appellant that Azian' will come by to deliver some things. second appellant have no knowledge as to what the subject matter is about.
>
> 'Hanif' excused himself to go to toilet and remarked to second appellant that Azian will be coming and told second appellant to request Azian to wait for him.
>
> While waiting, he saw Azian with his motorcycle and got off the machine with a parcel. The motorcycle was parked in between of two cars. Azian indicated that he wants to meet 'Hanif' and waited by the road-side. It was then that they were ambushed and arrested by police.

(d) the learned trial judge erred in not directing his mind as to whether s 34 of the Penal Code has been satisfied.

[11] In respect of submissions (a) and (b) we have said earlier that s 40A of the DDA 1952 obliges the court to accept the evidence of the agent provocateurs. That does not mean the second appellant cannot in law rebut the said evidence in his defence.

[12] The second appellant's allegation that the defence case was not considered by the learned judge in this case has no merits. The learned counsel in the court had also said that it was never put to the prosecution witness that negotiation was done with 'Hanif' and not the second appellant. In addition, there was no evidence of 'Alcontara Notice' given to the prosecution at the earliest opportunity to sustain some probative value to the defence case and also some opportunity for the prosecution to rebut the defence case (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705).

[13] As to the issue of common intention, we have stated our reasons why common intention is applicable in this case.

[14] Though the appellants have limited their submissions, we have perused the petitions of appeal in detail and the evidence and find no reason to interfere with the findings of the learned trial judge.

[15] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a

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conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).

[16] We are of the considered view it is a safe decision and appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeal.

Appeal dismissed.

Reported by Kohila Nesan